

months after the accident in which the action arose, the claim was time-barred, since on a proper construction, time only stopped running on the issue and not on the presentation of the writ. With respect, I entirely agree.

On this the action stood to be dismissed *in limine* and with every respect, it seems to me therefore that any consideration of the so-called second limb must be extraneous and any decision thereon *obiter*.

The decision on this point was that section 5 and section 6(1) and 6(4) of the Government Proceedings Ordinance contemplate that

"the identity of the officer must be ascertained and the liability of the officer must be established before the Government can be made liable."

Section 5 renders the government liable for tort by any public officer. Section 6(1) limits the action to those torts which "would have lain against such officer personally," while section 6(4) defines such public officer as someone employed at the material time by the government and paid out of government revenues or appropriate funds. With every respect, it does not seem that on a proper reading, these sections can be construed as laying down any strict rule of practice in proceedings against the government, failure to observe which would incapacitate the action. It is correct, I concede, that in an action for tort, the proper defendant is the wrong-doer but the person who is liable for the acts of the wrong-doer or to whom the liability for the injury has passed is also a proper defendant, and for myself, I would adopt the attitude of Viscount Simon,

"the courts before whom such a case as this comes have to decide it as between the parties before them."

in *Adams v. Naylor*⁽³⁾ which is a case for damages for negligence but which must now be read subject to the qualification that since then the Crown Proceedings Act 1947 has come into force.

Section 18 of our Government Proceedings Ordinance 1956 provides

"Subject to the provisions of this Ordinance the provisions of the written law relating to procedure shall apply to civil proceedings by and against the Government in the same way as to suits between subject and subject."

and must by itself and apart from other provisions, introduce the Rules of the Supreme Court. Of these rules, rule 11 of Order 16 provides that

"no cause or matter shall be divided by reason of the misjoinder or nonjoinder of parties and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the party actually before it..."

For these reasons, I do not, with respect, agree with the objection.

From a pragmatic point of view, it does not appear to matter at all, either at law or as a matter of evidence who was the particular officer in the Department of Customs and Excise who applied the taxing code now objected to by the plaintiff. There can be no doubt, I suppose, that if required to, government will supply the name of the officer concerned but the point is whether government is embarrassed or prejudiced. Clearly it was not. It delivered a defence without difficulty and before making the present ap-

A plication. If the action against government is maintainable in the form in which it is framed, clearly the only issue is the taxing code applicable to the particular goods in question, whether it was the code opted by the plaintiff or the code applied by government. On this issue, the identity of the particular public officer can have very little significance.

B The application is accordingly dismissed with costs.

Application dismissed.

Solicitors: *Lim Keun Siew & Co.*

C

FOH HUP OMNIBUS CO. BERHAD v. MINISTER OF LABOUR AND MANPOWER & ANOR.

[F.C. (Azmi L.P., Gill and Ali F.JJ.) May 4, 1973]

[Alor Star — Federal Court Civil Appeal No. 125 of 1972]

D

Administrative Law — Certiorari — Application for, to quash decision of Minister — Order for recognition of union — Decision of Minister final — Decision not a nullity — No breach of natural justice.

Industrial Law — Trade union — Recognition — Order — Decision of Minister final — Industrial Relations Act, 1967, s. 8.

E

This was an appeal against the dismissal of the appellant's motion for an order of *certiorari* to quash the decision of the Minister of Labour and Manpower. A trade union had claimed recognition and when the appellant company refused to accord recognition, the Minister directed the Registrar of Trade Unions to carry out a membership check and as a result thereof, he decided that the trade union be accorded recognition. The appellant company applied for an order of *certiorari* to quash the decision of the Minister but the application was refused. They appealed to the Federal Court.

F

Held, dismissing the appeal: (1) the Minister had a complete discretion as to the manner in which he was to act in settling a dispute as to recognition and in the circumstances of this case, there had been no breach of the rules of natural justice;

G

(2) as there was nothing on the facts or in the argument which could lead the court to the conclusion that the Minister's decision was a nullity, there were no grounds for interfering with the decision

Case referred to:-

(1) *Anisminic Ltd. v. Foreign Compensation Commission & Anor.* [1969] 1 All E.R. 208.

FEDERAL COURT.

H

S. Kulasegaran for the appellants.

Abdul Razak bin Datuk Abu Samah (Senior Federal Counsel) for the first respondent.

D. Puthucheary for second respondent.

I

Ali F.J.: This is an appeal against the dismissal of the appellants' motion for an order of *certiorari* to quash the decision of the Minister of Labour and Manpower. The decision is to the effect that the second respondent, Transport Workers' Union, Federation of Malaya, be accorded recognition by the appellant company.

On March 11, 1971 the union claiming recognition served a notice on the company under section 8(2)

of the Industrial Relations Act, 1967, as amended. Under sub-section (3) of the same section the company was required to act within 30 days either to accord recognition or, if recognition was not accorded, to notify the union in writing the ground therefor. The company refused to accord recognition and did not notify the union the ground or grounds for the refusal. Pursuant to sub-section (4) the union reported the matter to the Minister. In terms of sub-section (5) the Minister, on receipt of the report, was to take such steps as might be necessary or expedient to resolve the matter and that if the matter was not resolved to give a decision. Such decision would be final and could not be questioned in any court.

In this case before making his decision the Minister directed that a membership check be carried out. The object of the exercise was to ascertain from the union records or documents relating to membership how many of the union members were employees of the company. It seems agreed between the disputing parties that August 15, 1971 was to be taken as the date on which the membership was to be ascertained. In the event it was arranged for the check to be carried out on August 28, 1971.

On August 27, 1971 the company wrote to the Minister suggesting that the check be carried out along certain lines as indicated in their letter. The company also wished to be represented so that they could go through the union records or documents and satisfy themselves whether or not the union, in enlisting members, had acted in accordance with its constitution. As counsel for the company put it before us, the company seemed to have harboured some suspicion that the union records were not what they ought to be. Beyond that counsel was unable to say. As it happened, the union refused to allow the company to examine the records. In the situation it was thought necessary to postpone the check. The Minister sought for and obtained legal advice which seemed to favour the course of action proposed by the company in their letter of August 27. Notwithstanding all that the union refused to agree. The Minister then directed the Registrar of Trade Unions to carry out a membership check which was done on November 6, 1971. Neither the company nor the union were represented at the check. According to the Registrar's letter to the company he carried out the check with the help of officers from his department from the records or documents given by the company and the union. The result of the check showed that 50.1% of the union members were employees of the company. Based on that the Minister decided that the union be accorded recognition as from January 1, 1972.

Not having the right to appeal against the decision of the Minister, the company applied to the High Court for an order of *certiorari* on three main grounds, namely —

- (a) that the Minister failed to follow the principles and procedure laid down by the Industrial Court in a similar dispute;
- (b) that the Minister failed to give the appellants the opportunity "to present arguments, documents and evidence such as it has in answer to the claim for

the recognition by the union", in breach of the rule of natural justice; and

- (c) that the delegation of powers to the Registrar of Trade Unions in the matter of recognition and in respect of the membership check in connection therewith was *ultra vires* the powers of the Minister.

- B Only grounds (a) and (b) need be considered as ground (c) has been abandoned.

On ground (a) the appellants' argument was to this effect. Before section 8 was amended in 1969 the power to decide in a dispute over recognition was with the Industrial Court. In one particular case, it is said, the Industrial Court has enunciated certain principles and procedures before making its award. The record of the proceedings in that case covers several pages. Having gone through them I am unable to find any principle or procedures as having been enunciated by the Industrial Court which are to be of general application. Even if there was any, it can only be binding on the parties involved in that case unless, of course, it is otherwise provided in the statute. There is no such provision in the Industrial Relations Act. On the contrary section 25 provides that the making of any rule of procedure by the President of the Industrial Court requires the approval of the Minister. As pointed out by the learned judge in the High Court the words of subsection (5) of section 8 "such steps as may be necessary or expedient" give the Minister a complete discretion as to the manner in which he is to act in settling a dispute over recognition. With respect, I agree and hold that there is no merit or substance in ground (a).

- F As regards ground (b) the appellants complain that there was a breach of the rule of natural justice. It is necessary to consider the facts. The membership check was carried out by the Registrar of Trade Unions and his officers on November 6, 1971. On November 16, the company was informed of this by letter. On January 3, 1972 they were informed of the result of the check and of the Minister's decision. Quite clearly on November 12, 1971 when the company asked to be represented at the membership check they were six days late. In any case, their request for representation could not have been agreed to because of the union's stand in the matter. There is, however, another point to be considered. As I understand it the appellants are saying that the Minister before making his decision should have given them an opportunity to be heard. Such an opportunity, it seems, would have enabled them to present arguments or produce evidence to resist the union's claim for recognition. In other words the appellants should have the opportunity to challenge the result of the membership check. Here again it is necessary to examine the facts. In the first place it is clear that the membership check was carried out by a third party who could not possibly have any interest in the dispute. I am, of course, referring to the Registrar of Trade Unions and his officers. If the appellants have any doubt as to the genuineness of the union's claim for recognition nothing could be more fair than to have an impartial third party to resolve their doubt. The

impartiality of the third party in this case has never been questioned. It would be in question had the appellants been given the opportunity to challenge the result of the membership check. There is thus no substance in the appellants' complaint. Ground (b) must also fail.

At the hearing of this appeal a number of cases on natural justice was cited to us particularly by the learned Senior Federal Counsel who maintained that the words "shall not be questioned in any court" in sub-section (5) of section 8 oust the supervisory jurisdiction of a court of law, that is the High Court. The majority in the House of Lords in *Anisminic Ltd. v. The Foreign Compensation Commission and Another*⁽¹⁾ have held that those words are not sufficient to oust the jurisdiction of the court if the impugned determination or decision is a nullity. I need only quote the following words of Lord Reid on page 213:—

"... No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity. If the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any enquiry even whether the document relied on was a forgery, I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law."

Lord Reid, however, added —

"Undoubtedly such a provision protects every determination which is not a nullity."

In the instant case I can find nothing in the facts or in the argument which can lead me to the conclusion that the Minister's decision is a nullity. I do not propose to consider other cases on natural justice for the reason that they do not seem to cover the present situation.

Accordingly, I would dismiss this appeal with costs. Deposit to respondents.

Azmi L.P. and Gill F.J. concurred.

Appeal dismissed.

Solicitors: *Ranjit, Thomas & Kula; Skrine & Co.*

H. v. COMPTROLLER-GENERAL OF INLAND REVENUE

[F.C. (Azmi L.P., Suffian and Ong Hock Sim F.JJ.)

May 25, 1973]

[Kuala Lumpur — Federal Court Civil Appeal No. 93 of 1973]

Income Tax — Termination of service — Payment of compensation — Whether gratuity in respect of having or exercising employment or compensation for loss of employment — Whether payment was a voluntary one — Income Tax Act, 1967, ss. 3(a), 4(b), 13(1)(a) and (e) and Schedule to paragraph 15(1)(b).

The appellant had been employed on a number of short term contracts, the last of which was due to expire on October 26, 1968. On July 31, 1968 the appellant was given three months notice of termination of his contract of service and was given a sum of \$32,000 "ex gratia as compensation for loss of employment". The Comptroller-General assessed to income tax the sum of \$32,000. On appeal to the Special Commissioners they held that the sum was not compensation

for loss of employment but a gratuity in respect of having or exercising employment and therefore taxable under paragraph (a) of sub-section (1) of section 13 of the Income Tax Act, 1967. This decision was upheld by the High Court and the appellant thereupon appealed to the Federal Court.

Held: (1) the payment in this case was not compensation for loss of employment;

(2) the payment was a gratuity in respect of having or exercising employment within the meaning of paragraph (a) of sub-section (1) of section 13 of the Income Tax Act, 1967 and therefore it was liable to tax.

Cases referred to:—

- (1) *Chibbett v. Joseph Robinson & Sons* 9 T.C. 48 at p. 61.
- (2) *Comptroller-General of Inland Revenue v. T.* [1970] 2 M.L.J. 35, F.C.; [1972] 2 M.L.J. 73, 74, P.C.
- (3) *McClelland v. Northern Ireland General Health Services Board* [1957] 2 All E.R. 129.
- (4) *Holloway v. Toplar Corporation* [1940] 1 K.B. 173, 178.
- (5) *Beynon v. Thorpe* 14 T.C. 1.
- (6) *Duncan's Executors v. Farmer* 5 T.C. 417, 422.
- (7) *Hochstrasser v. Mayes* [1960] A.C. 376.
- (8) *Commissioners of Inland Revenue v. Wesleyan and General Assurance Society* 30 T.C. 11 at p. 25.
- (9) *Henry v. Foster* 16 T.C. 605, 634.

FEDERAL COURT.

S. Woodhull for the appellant.

Mohamad Nizar bin Idris (Federal Counsel) for the respondent.

In the court below the following judgment was delivered on August 19, 1972:

Gill F.J.: This is an appeal by way of case stated from an order of the Special Commissioners of Income Tax confirming the assessment by the Comptroller-General of Inland Revenue (the respondent) to income tax, as a gratuity under section 13(1)(a) of the Income Tax Act, 1967, the sum of \$32,000 which was paid to the appellant *ex gratia* on the termination of his fifth contract of service with his employers by the giving of a three month's notice as provided under the contract to expire at the end of the period of the contract.

The facts as found by the Special Commissioners, about which there is no dispute, are that the appellant served his employers under five separate contracts of employment commencing on April 24, 1951, February 26, 1956, August 21, 1959, March 27, 1963 and October 26, 1966 respectively. Under each of the contracts the employer had a right to terminate the appellant's employment at any time during the period of the contract by giving him three calendar months' notice or by paying three calendar months' salary in lieu of notice. Although the appellant was in continuous employment up to October 31, 1968 when he was 41 years of age, which meant that the total period of his employment was 17½ years, he was in fact re-engaged at the commencement of each of his contracts of service.

His first contract of service, under a written agreement dated April 24, 1951 between him and the Oriental Estates Agency, London, was for a period of four years at the end of which he was given eight months' leave. His next three contracts were for